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No. 85-1249

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DAVID L. McCOLLUM,

Petitioner,

– against –

ANTHONY R. REID,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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March 14, 1986

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POINT I

THE ISSUE OF THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE BEFORE THE COURT OF APPEALS

Respondent erroneously argues that the petitioner did not make its constitutional arguments in the New York State Court of Appeals. However, respondent

acknowledges that petitioner previously made his Equal Protection argument during the proceedings before the New York State Court Appeals. (Respondent's brief at page 6). Since the Court of Appeals considered the Petitioner's rights under the Equal Protection Clause because of his having been born "out of wedlock", the Court by clear implication considered whether the holding excluding the petitioner from the class by virtue of being "adopted out" of his natural family violated his rights under the Equal Protection Clause. Webb v. Webb, 451 U.S. 493 (1981).

Prior to the decision of the Court of Appeals decisions had been rendered by the Surrogate's Court and the Appellate Division of the Supreme Court in this matter. In both decisions the Courts

adhered to the statutory definition of the word "issue" and held that the petitioner, who was born out of wedlock and then adopted out of his natural family, was a member of the class "issue" as defined by the New York Legislature. N.Y. Est. Powers & Trusts Law 1-2.10. Indeed, the stipulation between the parties (contained at pp. A-64-66 of the petitioners Appendix) acknowledged that the petitioner clearly fit within the statutory definition of the word "issue".

The Court of Appeals interpreted the word "issue" so as to violate the plain meaning of the statute and so as to deprive the petitioner, and members of his class, from benefiting by the legislative definition. This case was the first instance in which the New York State Court of Appeals had or any New

York Court made such a construction. Therefore, neither party (nor any of the Courts rendering decisions in this case prior to the Court of Appeals) directly addressed the issue of the constitutionality of such a construction; instead the petitioner cited his general rights under the Equal Protection Clause and relied upon the statutory definition of the word "issue" in which he was included, as was found by the Surrogate and the Appellate Division of the Supreme Court.

To the extent that respondent argues that petitioner has not sufficiently raised the constitutional arguments below, certainly the petitioner should not be deprived of his constitutional rights because he did not specifically address a construction of a statute which had never been reached before; and which

was in direct violation of a legislative definition which had been relied upon by the petitioner, the Surrogate's Court, and the Appellate Division of the Supreme Court. To prohibit the petitioner from challenging such a construction would aggravate the violation of his rights and would create a vehicle by which the highest Court of a State could resolve litigation by altering a statutory definition thereby precluding the affected party from seeking redress to this Court. In the instant case the Surrogate, the Appellate Division of the Supreme Court, and two dissenting Judges of the Court of Appeals did not find it necessary to reach any constitutional issues as the resolution of this litigation was clearly found within a definition enacted by the New York Legislature. It was the major-

ity of the Court of Appeals which chose to deviate from such definition, thereby resulting in a constitutional deprivation to the petitioner for which relief is sought by way of this petition for certiori.

CONCLUSION

For the foregoing reasons the Petition for writ of certiori to the Court of Appeals of the State of New York should be granted.

Respectfully Submitted,

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March 5, 1986